

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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December 1, 2004

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Subject: *Aberdeen Finance Company v. South Dakota Network,*
L.L.C. (In re Aberdeen Finance Company),
Adversary Proceeding No. 04-1015;
Chapter 11; Bankr. No. 04-10175

Dear Counsel:

The matter before the Court is Plaintiff-Debtor Aberdeen Finance Company's September 24, 2004, Motion for Summary Judgment. This is a core proceeding under 28 U.S.C. § 157(c)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, Plaintiff-Debtor's Motion will be denied.

By its complaint against Defendant South Dakota Network, L.L.C., Plaintiff-Debtor is trying to recover as a preferential transfer a judgment lien that Defendant received when it reduced to judgment a claim on a letter of credit issued by Plaintiff-Debtor. The parties have agreed on the summary judgment standard in this Circuit and also what the required elements are for recovery of a preferential transfer. This applicable law will not be repeated herein.

The parties' primary point of contention appears to be whether Plaintiff-Debtor was insolvent when the judgment lien

was created. Plaintiff-Debtor relies on the presumption provided by 11 U.S.C. § 547(f). Defendant, questioning the appropriateness of a large charge-off Debtor made regarding accounts receivable, counters that Debtor was not insolvent when the judgment lien was created. The appropriateness of the charge-off raises a genuine issue of material fact, Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c), especially when the matter is viewed in the light most favorable to Defendant, the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and cites therein). Hence, the summary judgment motion will be denied.

Defendant's brief also raised an issue of law: on what date was the debt between Debtor and Defendant created, when Debtor did not honor the letter of credit or when the judgment was taken regarding the dishonored letter of credit? The Court of Appeals for this Circuit has answered that question. *Harrah's Tunica Corp. v. Meeks (In re Armstrong)*, 291 F.3d 517, (8th Cir. 2002). A debt is incurred when the debtor first becomes legally obligated to pay it. *Id.* at 522 (cites therein). Here, Debtor first became obligated to honor the letter of credit on June 3, 2003. Thus, that is the date the debt was created.

An order will be entered denying Plaintiff-Trustee's Motion for Summary Judgment and setting a final pre-trial conference. At the conference a trial date will be set to receive evidence only on whether Debtor was insolvent on March 19, 2004, the date Defendant took its judgment lien. As guided by 11 U.S.C. § 101(32) and *Jones Truck Lines, Inc. v. Full Service Leasing Corp.*, 83 F.3d 253, 258 (8th Cir. 1996), Debtor will be deemed to be insolvent if the sum of its debts was greater than all of its property, fairly valued. Since Debtor was a going concern at the time of the transfer, *Hoffinger Industries, Inc. v. Bunch (In re Hoffinger Industries, Inc.)*, 313 B.R. 812, 817-18 (Bankr. E.D. Ark. 2004), it should be valued as a going concern, not at liquidation value. *Jones Truck Lines*, 83 F.3d at 258.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: adversary file (docket original; serve parties in interest)